APPENDIX (A)

NATIONAL LABOR RELATIONS BOARD

In the Matter of: Big Run Coal & Clay Company
Case No. 9-CA-3225

DECISION AND ORDER

On March 12, 1965, Trial Examiner Herbert Silberman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respoindent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recom-

mended Order of the Trial Examiner, and orders that Respondent, Big Run Coal & Clay Company, Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 4, 1965.

John H. Fanning Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge filed on June 16, 1964, by United Glass and Ceramic Workers of North America, AFL-CIO, herein called the Glass Workers, a complaint dated July 24, 1964, was duly issued alleging that the Respondent, Big Run Coal & Clay Company, herein called the Company, has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent's answer to the complaint denies that it has engaged in the alleged unfair labor practices. A hearing in this proceeding was held before the undersigned at Lexington, Kentucky, on October 21, 1964. Thereafter, briefs were duly filed by General Counsel and by Respondent.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Company

Respondent, a Kentucky corporation, is engaged in the manufacture of bricks at its plant located in Lexington, Kentucky. During the past year, which period is representative of Respondent's operations, in the course and conduct of its business, Respondent sold and shipped from its Lexington, Kentucky, plant goods and products, valued at in excess of $50,000, to places outside the State of Kentucky. Respondent admits, and I find, that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Glass Workers is a labor organization as defined in Section 2(5) of the Act.

III. The unfair labor practices

Following an election conducted by the Board,[1] on June 27, 1963, the Glass Workers was certified as the exclusive collective-bargaining representative of employees of the Company in the following described unit:

> All production and maintenance employees of the Employer, at its plant on Stone Road in Lexington, Kentucky, excluding all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

---

1. Case No. 9-RC-5438.

On July 8, 1963, William H. Poske, Jr., international representative of the Glass Workers, wrote to C. A. Coleman, president of the Company, requesting a meeting for the purpose of beginning collective-bargaining negotiations. The letter included the following request:

> The Union further requests that employees of your Company who have been selected as wage committeemen and Local President be granted time off from their duties for the purpose of these negotiations.

The Local referred to in the Glass Workers' letter is Lexington Local No. 425, a duly organized affiliate of the Union, whose membership is limited to employees of the Company.

There were nine bargaining sessions between the Glass Workers and the Company, the first having been held on July 27, 1963, and the last on November 4, 1963. Poske attended all nine sessions. In addition, three representatives of Local 425 attended the first eight sessions. Porke described the Local's representatives, one of whom was its president, as the wage committee. Poske explained the function and authority of the wage committee to be as follows: "they were authorized (as a bargaining committee) from the Local Union's standpoint, but they were not a member of the negotiating committee, as such. I was there as the sole bargaining agent, I had this committee there with me, which we have in other negotiations for the purpose of becoming acquainted with union activities, for the purpose of public relations and for whatever information that they could give to me that I needed to bargain with. And as for them being a part of the negotiating committee I would say no." Poske further testified, also without contradiction, that there was no discussion with the Company representatives concerning the authority of the wage committee.

At the first bargaining session the Glass Workers submitted to the Company a draft of a proposed contract. The preamble to Article I of this agreement reads as follows:

> This Agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425 (hereinafter called the Union).

The identical preamble appears in all subsequent drafts of the proposed contract between the Company and the Glass Workers, including the draft which was mailed to the Company by the Glass Workers on December 31, 1963.

On November 4, 1963, the date of the last bargaining session, Poske appeared alone. Although asked, Poske declined to explain the absence of the wage committee and advised the Company representatives that he was present "as the sole bargaining agent and was prepared to consummate an agreement." Poske testified that the Company representatives were willing to continue negotiations in the absence of the wage committee but both Mr. Coleman and Mr. Caldwell (the Company's attorney) made it very plain that any understandings reached would have to be ratified by the membership of Local 425 before the Company would sign the contract. Although Poske did not agree to this condition, the parties continued their negotiations and arrived at an understanding regarding all the substantive terms of a collective-bargaining agreement. The terms of the agreement reached between Poske and the Company representatives on November 4 were modified in a minor respect on November 6 during a telephone conversation between Poske and Caldwell.

Concerning the reason for the absence of the wage

committee from the November 4 bargaining session, Poske testified: "Prior to the negotiating session on November 4th, I had received correspondence from various members of the Local Union stating and setting forth that they no longer wanted to have a Union and no longer wanted me to bargain for them . . ."

On November 5, 1963, attorney Caldwell mailed to Poske a draft of a contract reflecting the agreements reached at the November 4 meeting. In his letter of transmittal Caldwell advised that "it was and is the Company's position that we should not enter into a contract covering the employees of our plant, who compose the certified bargaining unit, without their knowledge and approval. This is especially advisable in view of the reports now coming to us indicating that a majority of the employees may have withdrawn from the Union and that, at this time, you may not actually have a majority of the bargaining unit. Under these circumstances, the Management is willing to execute the contract provided it has been presented to the membership of the bargaining unit and approved by them."

On December 31, 1963, Poske mailed to the Company a revised draft of the agreement, which was received January 2, 1964. This contract conforms in all respects with the earlier draft prepared by Caldwell except only for the inclusion of the change which was agreed to on November 6 and except that the signature page does not call for execution by Local 425 whereas the draft submitted by Caldwell calls for the signatures of the president and secretary of Lexington Local No. 425. Article XX of the contract, which relates to the term of the agreement, does not show the date on which the agreement becomes effective nor the date of its expiration, although it contains a conventional 60-days automatic renewal provision. However, at the hearing, the parties stipulated that the understanding between the Company and the Glass Workers was that the agreement was to be effective for a period of 1 year from the date of its execution. Therefore,

giving effect to this understanding, the draft prepared by the Glass Workers represents a complete contract embodying all the agreements reached between the Company and the Glass Workers. The copies of the contract mailed to the Company on December 31, had been executed by the Glass Workers and Poske's letter of transmittal requested the Company to sign and return three copies of the instrument.

On January 7, 1964, attorney Caldwell wrote to Poske reaffirming the Company's position as expressed in his letter of November 5, 1963, and returning the contracts unsigned. C. A. Coleman, president of the Company, testified that the absence of ratification by its employees and the absence of any signature by Local No. 425 were the only reasons that the Company refused to sign the agreement.

The factors relied upon by the Company furnish no lawful justification for its refusal to execute the contract mailed to it on December 31, 1963. (Said draft of agreement is hereinafter referred to as the "Contract.") The Act imposes upon an employer the duty to bargain collectively with the duly designated representative of his employees and, if requested, to execute a written contract incorporating the terms of any agreement reached.[2] Absent unusual circumstances, where the designation of representatives was evidenced by the results of an election conducted by the Board, this duty to bargain continues for at least 1 year from the date of the Board's certification notwithstanding any loss of majority by the union during such year.[3] Furthermore, loss of a majority does not modify or qualify the collective bargaining obligations of an employer during the certification year: it neither

---

2. Section 8(d). See *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514.

3. *Roy Brooks* v. *N.L.R.B.*, 348 U.S. 96.

excuses an employer from executing a written contract, if an agreement was reached with the union during the certification year,[4] nor permits him to impose as a condition to its execution that the terms of the agreement shall first be approved by the membership of the bargaining unit.[5] Accordingly, the Glass Workers purported loss of majority was not a legally sufficient reason for the Respondent's refusal to sign the Contract when it was received on January 2, 1964, less than 1 year after the Glass Workers' certification, or for its insistence upon ratification of the Contract by its employees as a prerequisite to its execution by the Company.

Respondent also contends that "the basis of negotiations was Mr. Poske's own formal proposal which, by its express terms set out in Article I, included the Local Union as one of the three contracting parties" and, therefore, without the concurrence of Local 425 no agreement was reached among all the parties to the negotiations. By insisting that Local 425 was a necessary party to the Contract, Respondent in effect takes the position that Local 425 had acquired a representative status equal to that of the Glass Workers and that a joint bargaining representative had been substituted for the certified representative. I find no merit to this argument. Although "[t]he Act does not prohibit the voluntary addition of a party"[6] to a collective-bargaining agreement between an employer and the certified representatice of his employees, the record in this case

---

4. *Holly-General Company, Division of Siegler Corporation,* 129 NLRB 1098.

5. "The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf." *North Country Motors, Ltd.,* 146 NLRB No. 82.

6. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 350.

does not support Respondent's assertion that the Company an the Glass Workers had agreed to add Local 425 as a party to their Contract.[7] The subject was not discussed during the negotiations. According to the uncontradicted testimony of Poske, the representatives of Local 425 attended the bargaining sessions merely in the capacity of observers and consultants and had no authority as negotiators. Furthermore, at the November 4 meeting, Poske specifically informed the Company representatives that he was acting "as the sole bargaining agent." Thus, any misapprehension on the part of the Respondent as to the status the Glass Workers was claiming for Local 425 was effectively dispelled before the conclusion of the negotiations. In the circumstances, despite the preamble to Article I of the various drafts of contract prepared in the course of the negotiations, the Company could not fairly have assumed (and no testimony was offered on behalf of the Respondent that its representatives had made any such assumption) that the Glass Workers was proposing, and was bargaining on the basis, that Local 425 would be included as a necessary party to their agreement and that the approval of Local 425 would be required as a condition to the successful conclusion of negotiations. A similar issue was decided by the Board in *The Standard Oil Company* case.[8] In that case the Board held that the certified bargaining agent alone was entitled to statutory representative status despite a series of collective-bargaining agreements, entered into subsequent to the date of certification, which had

---

7. In view of my findings it is unnecessary to consider whether a certified representative may unilaterally repudiate an agreement with the employer to add an affiliated union as a party to any agreement they might negotiate.

8. 92 NLRB 227, 235-236, remanded on other grounds, *N.L.R.B.* v. *Standard Oil Co.*, 196 F. 2d 892 (C.A. 6).

been jointly executed by both the local and international.[9]

Accordingly, I find that the Respondent, by refusing on and after January 2, 1964, to execute the Contract embodying the rates of pay, wages, hours of employment, and other conditions of employment, as theretofore agreed upon, failed to bargain collectively, as required by Section 8(d) of the Act, with the Glass Workers as the exclusive representative of its employees in the appropriate unit, and thereby violated Section 8(a)(5) and (1(of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations, described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices it will be recommended that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

---

9. See also *Eastern Massachusetts Street Railway Company*, 110 NLRB 1963, enfd., 235 F. 2d 700 (C.A. 1); and *Kit Manufacturing Company, Inc.*, 150 NLRB No. 62. Mr. Justice Harlan in his dissenting opinion in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 362, observed, "By conditioning agreement upon a change in signatory from the certified exclusive bargaining representative, the company here in effect violated this duty [to execute a written contract incorporating any agreement reached if requested]."

I have found that the Company and the Glass Workers reached an agreement with respect to the terms and conditions of employment for the employees in the unit represented by Glass Workers, and that the Company has failed in its statutory duty to bargain collectively with said Union, by refusing, during the year following the date of the Union's certification, to execute the written contract incorporating the terms of their agreement. Although more than 1 year now has elapsed since the date of the Glass Workers' certification and the Union may no longer represent a majority, "[i]t would do violence to the Act [and] . . . would encourage purposeful delay"[10] if, for such reasons alone, the Respondent should be exeused from the obligation to bargain collectively with the Glass Workers and thereby would be absolved from the consequences of its unfair labor practices.[11] (([A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[12] Respondent's failure to implement the agreement it reached with the Glass Workers by its unlawful refusal to execute the contract prevented the achievement of any measure of practical success in its bargaining relationships with that Union. Accordingly, it is necessary, in order to effectuate the purposes of the Act, to recommend an order requiring the Company to take such appropriate remedial action as will promote the accomplishment of this objective.

The contract mailed by the Union to the Respondent on December 31, 1963, a copy of which was received in evidence as an exhibit in this case and was marked

---

10. *N.L.R.B.* v. *Warrensburg Board & Paper Corporation,* 58 LRRM 2145 (C.A. 2).

11. *N.L.R.B.* v. *Katz,* 369 U.S. 736, 748, ftn. 16.

12. *Frank Bros. Company* v. *N.L.R.B.*, 321 U.S. 702, 705.

"G.C. Exhibit 7," correctly reflects the agreement between the Company and the Glass Workers. Said Contract, in accordance with the agreement of the Company and the Glass Workers, was to be effective for an initial term of 1 year from the date of its execution subject to automatic renewal for additional periods of 1 year unless notice to terminate or modify the agreement shall have been given by either party to the other 60 days prior to any anniversary date. Consistent with Board precedent, I shall recommend that, upon request of the Union, the Respondent sign the contract and deliver an executed copy thereof to the Union, and that said Contract shall be retroactively effective to January 2, 1964, the date when a completed draft thereof was received by Respondent for its signature, and prospectively effective from that date to at least the next renewal date, to wit, January 2, 1966.[13] Due to the lapse of time, the Glass Workers may, however, desire to bargain for a new agreement immediately rather than bebound by the terms of an agreement reached in 1963. Accordingly, I shall recommend that if no request to sign the Contract is made by the Glass Workers the Respondent, upon request of said Union, shall bargain collectively with it as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to fully remedy the violations of the Act committed herein, I shall also recommend that, if the Respondent is requested by the Glass Workers to execute the Contract, the Respondent shall make the employees whole for any losses they may have suffered by reason of Respondent's unlawful refusal to execute the Contract. A failure to provide for the foregoing, retroactive to January 2, 1964, would enable the Respondent to benefit from its own unfair labor prac-

---

13. *Ogle Protection Service, Inc.*, 149 NLRB No. 50.

tices. Any backpay which shall be due to employees pursuant hereto shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and shall bear interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. By failing and refusing, since January 2, 1964, to execut the written Contract embodying the terms of the agreement reached by the Respondent and the Glass Workers with respect to wages, hours of employment and other conditions of employment for employees in the appropriate bargaining unit described below, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act. The appropriate collective bargaining unit is composed of all production and maintenance employees of the Respondent, at its plant on Stone Road in Lexington, Kentucky, excluding all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

2. By the foregoing conduct Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant

to Section 10(c) of the Act, I hereby recommend that Respondent, Big Run Coal & Clay Company, its officers, agents(successors and assigns, shall:

1. Cease and desist from:

(a) Refusing, if requested to do so by the Glass Workers, to sign the Contract reached with that Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to bargain collectively through representatives of their choosing.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request of the Glass Workers, forthwith execute the Contract described in the section of this Decision entitled "The remedy" and deliver an executed copy thereof to the Glass Workers. Said Contract, subject to its automatic renewal clause, shall be effective from January 2, 1964, until January 2, 1966. However, if no request to execute the Contract is made, upon request of the Glass Workers, bargain collectively with it as the exclusion(?) representative of employees in the unit described above, and, if an agreement is reached, execute a written contract incorporating the terms of such agreement.

(b) Upon request of the Glass Workers that the aforesaid Contract be executed, give effect, retroactive to January 2, 1964, to the terms of said Contract, including but not limited to the provisions relating to wages and other benefits, and make whole the employees, in the manner set forth in the section of this Decision entitled "The remedy," for any losses suffered by them by reason of Respondent's refusal to execute the Contract.

(c) Post at its plant in Lexington, Kentucky, the notice attached hereto and marked "Appendix."[14] Copies of said notice to be furnished by the Regional Director for the Ninth Region, shall, after being signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director in writing, within 20 days from the date of the receipt of this Decision what steps Respondent has taken to comply herewith.[15]

Dated at Washington, D. C., March 12, 1965.

/s/ Herbert Silberman
Trial Examiner

---

14. In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

15. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

FILED
NOV 13 1967
CARL W. REUSS, Clerk

APPENDIX (B)

No. 17,149

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	ORDER
BIG RUN COAL & CLAY CO., Respondent.	)	

Before: EDWARDS, Circuit Judge, MCALLISTER, Senior Circuit Judge, KENT*, District Judge.

This is a petition for enforcement of an order of the National Labor Relations Board requiring the respondent to execute a contract with United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425. The company resisted the execution of the contract without a ratification by the members of the local union involved.

This case is controlled by the decision of this Court in *Houchens Market* v. *National Labor Relations Board,* C.A. 6, 1967, 375 F. 2d 208, and the cases therein cited.

It is ORDERED that enforcement of the order of the National Labor Relations Board be, and it is hereby granted.

ENTERED BY ORDER OF THE COURT
CARL W. REUSS
Clerk

(*) Honorable W. Wallace Kent, Chief Judge, United States District Court, Western District of Michigan, sitting by designation.

FILED
FEB 8 - 1968
CARL W. REUSS, Clerk

APPENDIX (C)
No. 17,149

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	ORDER
BIG RUN COAL & CLAY CO., Respondent.	)	

Before: EDWARDS, Circuit Judge, MCALLISTER, Senior Circuit Judge, and KENT, District Judge.*

Upon consideration, it is ORDERED that the petition for rehearing, filed by respondent in the above captioned case be, and hereby is, denied.

Entered by order of the Court
CARL W. REUSS
Clerk

---

* Honorable W. Wallace Kent, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.